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ABSTRACT

During its 1997-98 term, the U.S. Supreme Court decided four major sexual harassment cases. This article summarizes those cases' impact on the analytical framework governing school boards' liability of sexual harassment. The text opens with the issue of sexual harassment of employees by supervisors and two cases that established new standards governing an employer's liability under Title VII for sexual harassment of an employee perpetrated by a supervisor. Some cases that have drawn on these two decisions are discussed. Some of the other types of harassment that were addressed by the Court included sexual harassment of employees by coworkers, same-sex harassment under Title VII, sexual harassment of students by school employees, and sexual harassment of students by students. Cases that have applied the standards established by the Court are described. Numerous practical suggestions that schools should follow to decrease legal liability for sexual harassment include ensuring that the sexual harassment policy is distributed to all employees, that the policy clearly designates the officials to whom complaints should be made, that the policy allows an employee to bypass the alleged harasser in filing a complaint, and that the policy should strongly prohibit retaliation against complainants. (RJM)

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Sexual Harassment Law after the 1997-98 U.S. Supreme Court Term

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During the 1997-98 term, the U.S. Supreme Court decided four major sexual harassment cases. This article will summarize those cases' impact on the analytical framework governing school boards' liability for sexual harassment. The article also will discuss how lower courts are applying the new Supreme Court rulings. Finally, the article will provide some practical suggestions for avoiding liability in light of the new rulings.

SEXUAL HARASSMENT OF EMPLOYEES BY SUPERVISORS

In *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Industries v. Ellerth*, 118 S.Ct. 2257 (1998), the Supreme Court established new standards governing an employer's liability under Title VII for sexual harassment of an employee perpetrated by a supervisor. The issue had been subject to fierce debate since the Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The Court in *Meritor* ambiguously stated that agency principles apply but that an employer is not automatically liable for harassment by a supervisor.

The plaintiff lifeguard in *Faragher* alleged that two of her three male supervisors created a sexually hostile environment by lewd remarks, uninvited and offensive touching, and derogatory comments about women. Plaintiff never reported the incidents to her harassers' superiors. She did report the conduct to her third supervisor, but not as a formal complaint; he did not report the conduct to his superiors. Plaintiff resigned and filed suit under Title VII. Her employer, the City of Boca Raton, had enacted a sexual harassment policy, but the policy had not been distributed to the plaintiff and the City's other beach employees.

In *Ellerth*, plaintiff salesperson quit her job after allegedly being subjected to repeated sexually offensive remarks and gestures by a male supervisor who was above plaintiff's immediate supervisor in the corporate hierarchy. The harassing supervisor also allegedly threatened adverse employment action (such as not promoting plaintiff) if plaintiff did not "loosen up," but the threats were not carried out. Although the employer had a policy against sexual harassment, plaintiff did not inform anyone in authority of the alleged harassment. She apparently chose not to inform her immediate supervisor because he was below the harassing supervisor.

The Supreme Court upheld the federal district court's ruling in *Faragher* that the City of Boca Raton was liable for the sexual harassment of Faragher by her supervisors. In *Ellerth*, the Supreme Court ruled that summary judgment for the employer was erroneous. The employer in *Ellerth* was held vicariously liable for the supervisor's actions, but the case was remanded to give the employer an opportunity to assert and prove a newly enunciated affirmative defense, discussed below.

The Supreme Court established a new standard for Title VII supervisor harassment in the *Faragher* and *Ellerth* cases. An employer's liability for sexual harassment of employees by supervisors is now determined as follows:

- *An employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.* This vicarious liability is not because sexual harassment is within a supervisor's scope of employment (it is not), nor because of any apparent authority to commit sexual harassment. Rather, the Court relied on the agency doctrine known as "aided-by-the-agency-relation," set forth in the Restatement (Second) of Agency, § 219(2)(d). Where the infliction of harm is aided by the fact of an agency relationship, the harm is attributable to the agency relationship, and the employer is liable. In the context of sexual harassment by a supervisor, the agency relationship allows the supervisor contact with the employee, and also makes it more difficult for the employee to deter the unwanted conduct. *Faragher*, 118 S. Ct. at 2291.

- *Where a supervisor's harassment culminates in a tangible employment action taken against the employee, the employer will be strictly liable and cannot rely on an affirmative defense.* "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 118 S. Ct. at 2268.

- *Where no tangible employment action is taken, the employer may raise an affirmative defense* to liability or damages, subject to proof by a preponderance of the evidence. *Id.* at 2270.

- *The affirmative defense comprises two necessary elements:* (a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, *and* (b) that the

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plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*

Applying this standard, the Court upheld the verdict in favor of Faragher. The affirmative defense was not available to the City of Boca Raton for several reasons: (1) the employer completely failed to disseminate its sexual harassment policy among the beach employees, (2) the sexual harassment policy did not assure that harassing supervisors could be bypassed, and (3) city officials made no attempt to keep track of the conduct of its supervisors. As a matter of law, the City could not be found to have exercised reasonable care to prevent the harassing supervisors' conduct. In contrast, the employer in *Burlington* was given an opportunity to assert and prove the affirmative defense.

Prior to these Supreme Court decisions, many lower courts had ruled that employers were vicariously liable for supervisors' sexual harassment of employees in "quid pro quo" cases, but not in "hostile environment" cases. The Supreme Court stated that the terms "quid pro quo" and "hostile environment" might be helpful in determining the threshold question of whether a plaintiff can prove discrimination, but are of limited utility otherwise and are not controlling on the issue of vicarious liability. *Ellerth*, 118 S. Ct. at 2264-2265. To the extent those terms are relevant, a threat which is unfulfilled should be categorized as a hostile work environment claim rather than a quid pro quo claim.

Recent Cases Applying Faragher and Ellerth

Probably the biggest question after *Faragher* and *Ellerth* is how courts will treat the newly created affirmative defense, especially in the context of an employer's motion for summary judgment. Justice Thomas's dissenting opinion in *Ellerth* describes the majority opinion as providing "shockingly little guidance" in this area, thereby "ensuring a continuing reign of confusion." 118 S. Ct. at 2273-2274. The first reported cases grappling with the new affirmative defense tend to reveal varying judicial approaches.

The employer in *Fierro v. Saks Fifth Ave.*, 1998 U.S. Dist. LEXIS 10169 (S.D.N.Y. July 7, 1998), won summary judgment under the affirmative defense. Saks met the first element of the affirmative defense by promulgating an anti-harassment policy which contained complaint procedures readily available to plaintiff employee. As for the second element, plaintiff stated that he did not file a complaint because he was afraid of potential repercussions. The court held that an employee's generalized fears of repercussions can *never* constitute reasonable grounds for the employee's failure to complain to his or her employer. Every employee who feels harassed by a supervisor will fear the inevitable unpleasantness which results from filing a complaint. To allow an employee to circumvent a reasonable complaint procedure by making conclusory allegations of feared repercussions would eviscerate the affirmative defense. The court observed that plaintiff did not identify any employees who had been subjected to retaliation for filing a complaint.

A similar analysis was employed in *Scouce v. Tandy Corp.*, 9 F. Supp. 2d 773 (W.D. Ky. 1998). Every new employee received an employee handbook which specifically proscribed sexual harassment and identified three separate company offices to which employees could submit complaints. The court rejected plaintiff's assertion that she had reasonable grounds for not reporting the alleged harassment. Plaintiff said she was told by her supervisor that if she reported the misconduct they would both be terminated. The court ruled that an effective sexual harassment procedure protects an employee against retaliatory conduct, thereby divesting a harassing supervisor of any power. "It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection. To hold otherwise would render the affirmative defense meaningless." *Id.* at 778. The court specifically noted that the employer's sexual harassment policy would permit an employee to bypass a supervisor who was the harasser.

Summary judgment in favor of the employer also was granted in *Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185 (D.P.R. 1998). The first element of the affirmative defense was satisfied by the fact that plaintiff received a copy of the sexual harassment policy and signed a receipt to that effect. The court also found that plaintiff did not have a reasonable basis not to file a sexual harassment report under the sexual harassment policy. The employee's aversion to the supervisor who allegedly harassed him did not justify his failure to report to the company's human resources director, a different person. The employee's shame to tell anyone about the same-sex harassment also was not a sufficient reason, given the employer's stated policy of handling sexual harassment complaints in a confidential manner. Finally, the employee's expressed fear that the company would not give him his back pay if he reported harassment was unreasonable, in the absence of supporting evidence.

A different judicial attitude toward the affirmative defense is evident in *Phillips v. Taco Bell Corp.*, 1998 U.S. App. LEXIS 24494 (8th Cir. Oct. 1, 1998). The Eighth Circuit reversed the lower court's order granting summary judgment in favor of Taco Bell. Taco Bell maintained a written sexual harassment policy which was posted in all stores. All employees, including the plaintiff, had confirmed in writing their understanding of the policy's contents. Nevertheless, the Eighth Circuit stated that whether these facts satisfied the first element of the affirmative defense was best left to the finder of fact. As for the second element of the affirmative defense, the employee allegedly had been sexually harassed by a supervisor for some *three* months before she complained. The court agreed that Taco Bell took prompt and appropriate remedial action once the harassment was reported. However, the court was unwilling to rule as a matter of law that plaintiff's three month delay in reporting the harassing conduct was unreasonable, again leaving that issue to the finder of fact.

One of the best discussions of applying the new affirmative defense in the summary judgment context is contained in *Fall v. Indiana University*, 12 F. Supp. 2d 870 (N.D. Ind. 1998). The court emphasized that the first element of the affirmative defense requires an employer to prove not only that it responded promptly and appropriately to a sexual harassment complaint, but also that it exercised reasonable care to prevent such behavior from occurring in the first place. Defendant university had a sexual harassment policy, and immediately launched an investigation into plaintiff's claim of sexual harassment by the university's Chancellor. However, the court found a triable issue of fact as to whether the university had actual or constructive notice that the Chancellor had a history of inappropriate sexual behavior toward female employees. If the university were negligent in preventing the Chancellor's harassment of plaintiff from occurring in the first place, then the affirmative defense would not be available. With respect to the second element of the affirmative defense, the employee delayed three months before submitting a complaint under the university's sexual harassment policy. As in the *Phillips* case, the court did not find this delay unreasonable as a matter of law.

In *Montero v. AGCO Corp.*, 1998 U.S. Dist. LEXIS 15134 (E.D. Cal. Aug. 14, 1998), the court granted summary judgment for the employer based on the affirmative defense. The first element was satisfied by plaintiff's awareness of the company's anti-harassment policy which contained a complaint procedure. The second element was satisfied by plaintiff's waiting nearly two years before reporting the alleged harassment. Her excuse was that she feared retaliation by her harassing supervisor, but the court noted that the company's sexual harassment policy allowed employees to lodge complaints directly with the human resources department, bypassing plaintiff's supervisor.

One interesting issue raised by the new Supreme Court cases is whether the same standard of employer liability applies to both sexual harassment and racial harassment cases. Justice Thomas's dissent in *Ellerth* concludes that different standards now apply. Justice Souter's majority decision in *Faragher* states that the standards for racial and sexual harassment may not be entirely interchangeable, but generally should be harmonized. 118 S. Ct. at 2283 n.1. Some subsequent lower court decisions state that the standards are the same, *e.g.*, *Wright-Simmons v. City of Oklahoma City*, 1998 U.S. App. LEXIS 22542 (10th Cir. Sept. 15, 1998); while other recent cases leave the issue open, *e.g.*, *Cano v.*

City of Dallas, 1998 U.S. Dist. LEXIS 13070, at *14 n.3 (N.D. Tex. Aug. 20, 1998).

Another issue raised by the new Supreme Court cases concerns the definition of "tangible employment action," negating the availability of the affirmative defense. In *Ellerth*, the Court defined "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 118 S. Ct. at 2268-69. In *Carr v. City of Dallas*, 1998 U.S. Dist. LEXIS 13070, at *23 n.9 (N.D. Tex. Aug. 20, 1998), the court ruled that the definition of "tangible employment action" appears to be the functional equivalent of the terms "adverse employment action" or "ultimate employment decision," utilized as a threshold for Title VII retaliation claims.

The Fourth Circuit recently held that a "tangible employment action" under *Ellerth* requires a more significant change in employment status than did the concept of "tangible job detriment" previously utilized to support a claim of quid pro quo sexual harassment. *Reinhold v. Commonwealth of Va.*, 151 F.3d 172, 174-75 (4th Cir. 1998). Specifically, the Fourth Circuit ruled that a school psychologist's evidence that her supervisor assigned her extra work, gave her inappropriate work assignments, and denied her the opportunity to attend a professional conference did not constitute "tangible employment action." The Plaintiff in *Reinhold* suffered no direct economic harm, and the Fourth Circuit did not consider her allegations to constitute a "significant change in employment status." *Id.* at 175.

SEXUAL HARASSMENT OF EMPLOYEES BY CO-WORKERS

Faragher and *Ellerth* involved sexual harassment perpetrated by supervisors. Lower courts agree that the vicarious liability standard enunciated in those cases does not apply to sexual harassment perpetrated by co-workers. *Henderson v. Whirlpool Corporation*, 1998 U.S. Dist. LEXIS 15098 (N.D. Okla. Aug. 14, 1998); *Ocheltree v. Scollon Productions*, 1998 U.S. App. LEXIS 18680, at *9 n.1 (4th Cir. Aug. 11, 1998). The Supreme Court in *Faragher* specifically noted that sexually harassing behavior is considered a classic "frolic and detour" outside the scope of employment. 118 S. Ct. at 2287.

Lower courts generally rule that harassment of an employee by co-workers does not create vicarious liability. A negligence standard applies: the employer will be liable if it knew or should have known of the harassment and failed to take timely corrective action reasonably calculated to end the harassment. *See, e.g., Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996). *See also* 29 C.F.R. §1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

SAME-SEX HARASSMENT UNDER TITLE VII

In *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), the Supreme Court held that same-sex harassment can be actionable under Title VII. The plaintiff was a male oil rig worker who alleged that he had been sexually taunted and abused by his male co-workers. Clearing a conflict among the lower courts, the Supreme Court ruled that same-sex harassment claims are viable and do not require a homosexual context. The crucial issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. 118 S. Ct. at 1002. Actionable same-sex harassment might be motivated by sexual desire, as in the case of harassment by homosexual co-workers or supervisors, but also could be based on other sex-related motivations. An example would be same-sex harassment motivated by hostility towards the presence of women in the workplace or in a particular position.

The Supreme Court rejected the argument that recognizing liability for same-sex harassment will transform Title VII into a "general civility code for the American workplace." First, the statute prohibits *discrimination*, not harassment in general. Nor is harassment prohibited just because it involves sexual content or connotations. The mere fact that a plaintiff takes strong offense to sexual statements or horseplay does not mean that the employee was discriminated against based on his or her sex. There is no discrimination unless members of one sex are disadvantaged relative to members of the other sex.

Second, the Supreme Court reiterated that Title VII proscribes only behavior that is so objectively offensive as to alter the conditions of the victim's employment. A hostile environment claim, whether based on same-sex harassment or opposite-sex harassment, requires conduct that is sufficiently severe or pervasive to meet the standards of *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

Recent Cases Applying Oncale

In *Doe v. Dallas Independent School District*, 153 F.3d 211 (5th Cir. Aug. 27, 1998, as revised Sept. 17, 1998), the Fifth Circuit Court of Appeals extended the *Oncale* same-sex sexual harassment analysis from Title VII claims to Title IX claims. Accordingly, the Fifth Circuit reinstated a Title IX claim filed on behalf of male elementary school students who were sexually molested by a male third grade teacher.

SEXUAL HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES

Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998), is a very important decision providing substantial protection to school boards from Title IX claims brought by students sexually harassed by school employees. Plaintiff, a female high school student, allegedly was seduced by a teacher. The school principal was aware of complaints that the teacher had engaged in sexually suggestive comments to students, but no school employee (other than the teacher) was aware of the alleged fondling and sexual intercourse. The student asked the Supreme Court to hold the school board liable by applying vicarious liability standards utilized in Title VII cases, but the Court declined the invitation.

The Supreme Court distinguished Title VII and Title IX on several bases. First, Title VII specifically calls for application of agency principles, since an "employer" is defined to include "any agent." 42 U.S.C. § 2000e-(b). Second, the Court characterized Title VII's central aim as compensating victims of discrimination, whereas Title IX was characterized as having a greater focus on protecting individuals from discriminatory practices. Third, and perhaps most important, the Court focused on the contractual nature of Title IX. The Court thought Congress did not intend that school districts who received federal Title IX funds were thereby agreeing to accept liability for discrimination of which the school district was unaware. Fourth, the language of Title IX provides guidance as to its enforcement. The statute's express means of enforcement — withholding federal funds by an administrative enforcement process — requires actual notice to school officials and an opportunity for voluntary compliance. It would be anomalous for a judicially implied system of enforcement (the implied private cause of action) to impose liability more readily than does the statute's express system of enforcement.

Accordingly, the Supreme Court rejected imposing Title IX liability for damages against school boards based on theories of vicarious liability (respondeat superior) and constructive notice. Under *Lago Vista*, a school district will not be liable for sexual harassment of a student by a school employee unless the following conditions are met:

- An appropriate school official must have **"actual knowledge"** of discrimination;

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- The school official must have **authority to take corrective action** to address the alleged discrimination;
- The school official must **fail to respond adequately**; and
- The inadequate response must amount to **deliberate indifference** to discrimination.

The plaintiff student in *Lago Vista* could not establish actual notice. The high school principal's knowledge of complaints about the teacher's inappropriate comments during class "was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." 118 S. Ct. at 2000. Nor could the teacher's knowledge of his own misconduct be attributed to the school district. "Where a school district's liability rests on actual notice principles... the knowledge of the wrongdoer himself is not pertinent to the analysis." *Id.*

Summary judgment was entered for the school board notwithstanding that the school board allegedly failed to promulgate and publicize an effective sexual harassment policy and grievance procedure in violation of Department of Education regulations, 34 C.F.R. § 106.8(b). The Supreme Court noted that an alleged failure to comply with the regulations does not satisfy the actual notice and deliberate indifference standards required under Title IX. The Court also stated that failure to promulgate a grievance procedure would not constitute discrimination under the statute. The Department of Education has authority to promulgate and administratively enforce its requirement of a grievance procedure, but the implied private right of action under Title IX does not allow damages for violations of administrative requirements, which do not constitute actual discrimination. It also should be noted that the *Lago Vista* holding rejected a 1997 Policy Guidance issued by the Department of Education, which would hold a school district liable in damages under Title IX whenever a teacher is aided in carrying out sexual harassment of students by his or her position of authority.

Justice Stevens's dissent, joined by three other Justices, asserted that agency principles should apply to Title IX cases. The dissent would hold the school board liable under the "aided-by-the-agency-relation" doctrine set forth in the Restatement (Second) of Agency, § 219(2)(d). That doctrine was the foundation for the Supreme Court's Title VII holdings in *Faragher* and *Ellerth*, decided just four days after the *Lago Vista* decision.

Recent Cases Applying the Lago Vista Standard

The plaintiffs in *Morse v. University of Colorado*, 1998 U.S. App. LEXIS 20106 (10th Cir. Aug. 17, 1998), were students in the University of Colorado's ROTC program. They allegedly were subjected to a sexually hostile environment created by a fellow student who was a higher-ranking cadet in the ROTC program, and also by an ROTC instructor to whom they reported the alleged harassment. The students alleged that they reported the harassment to a university dean and to the university's affirmative action officer, who did not take any remedial action. The federal district court dismissed the complaint. Relying on *Lago Vista*, the Tenth Circuit reversed and reinstated the complaint. The decision is straightforward, when applied to the allegations of sexual harassment perpetrated by an instructor, followed by unfruitful complaints to high-ranking officials. More interesting is the case's apparent support for the proposition that sexually harassing conduct by a student is to be evaluated in the same manner as sexually harassing conduct by an employee, where the student harasser is exercising some measure of authority bestowed by the defendant educational institution.

The Tenth Circuit affirmed the dismissal of a student's complaint for sexual harassment in *X by Y v. Fremont County School District No. 25*, 1998 U.S. App. LEXIS 24587 (10th Cir. Oct. 2, 1998). The record contained no evidence that any school official had actual notice of the offending conduct, as required by *Lago Vista*. The case is noteworthy for the concurring opinion by Judge Lucero, who felt that the "actual notice" requirement was unfortunate when applied to young children who "are neither likely nor well-equipped to report acts of harassment by [teachers]." *Id.* at *10.

In *Miller v. Kentosh*, 1998 U.S. Dist. LEXIS 9497 (E.D. Pa. June 29, 1998), a female high school student allegedly had a sexual relationship with a band instructor. The federal district court granted summary judgment in favor of the school district on the student's Title IX claim. On the issue of "actual notice," plaintiff's hearsay allegations that the principal had notice of the relationship were inadmissible and did not create an issue of disputed fact when contradicted by the principal's affidavit. The fact that another teacher was aware of the relationship was insufficient to hold the school system liable, because a teacher is not an official with authority to take corrective action as required by *Lago Vista*. In any event, the other teacher did not show deliberate indifference; upon hearing of the alleged relationship, the teacher inquired of the student and the band instructor and explained the ramifications of an improper relationship to them both. The *Miller* case is useful precedent that any good faith response should negate a finding of "deliberate indifference."

Burtner v. Hiram College, 9 F. Supp. 2d 852 (N.D. Ohio 1998), focuses on the *Lago Vista* "actual notice" requirement. Plaintiff college student did not notify the college of her alleged sexual harassment by a professor until two days prior to her graduation. The college was granted summary judgment, because the 11th hour notice did not give college officials time to correct the problem. The court also found that college officials were not deliberately indifferent, where the plaintiff's complaint was processed that summer.

The plaintiff in *Burtner* contended that the college had received actual notice of sexual harassment by the professor a year previously, when another female student ("M") met with the college's grievance officer to complain about the professor. At the meeting, "M" had with her a written complaint alleging sexual harassment, but upon being told that the college could not keep her complaint absolutely confidential, "M" chose not to file her written complaint. The grievance officer submitted an affidavit stating that she first became aware of a sexual harassment complaint against the professor when plaintiff complained. The facts are ambiguous as to whether "M" orally informed the grievance officer that she had a concern about sexual harassment, or whether "M" merely complained about the professor's grading practices instead. The court ruled that the grievance officer did not have actual notice. The *Burtner* case might be useful precedent to show that "actual notice" must be clear notice, and that ambiguous facts do not establish actual notice.

Klemencic v. Ohio State University, 10 F. Supp. 2d 911 (S.D. Ohio 1998), involved a student who alleged that she was sexually harassed by the assistant coach of the college women's track team. The court granted summary judgment for the college. The court found no material issue of fact supporting a finding of deliberate indifference, where the athletic director conducted an investigation; the athletic director counseled the assistant coach about his conduct; the coach received a written letter of reprimand; and no further harassment occurred. Significantly, the court rejected any inference of deliberate indifference based on the college's failure to advise plaintiff of the reprimand. "There is no obligation in sexual harassment jurisprudence to notify the alleged victim of the punitive or remedial measures undertaken as long as they indeed are taken." *Id.* at 919 n.8. The plaintiff contended that deliberate indifference was shown by the fact that the assistant coach was not removed from the team, and that plaintiff did not receive an apology. The court responded that the college could not be deemed deliberately indifferent for its failure to accede to plaintiff's demands, when those demands require more than what is necessary to remedy the harassment.

SEXUAL HARASSMENT OF STUDENTS BY STUDENTS

In the 1997-98 term the Supreme Court did not address the highly contested issue of whether Title IX covers claims against school boards based on student-to-student sexual harassment. However, on September 29, 1998, the Supreme Court granted certiorari in the case of *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.1997), *cert. granted*,

1998 U.S. LEXIS 4643 (U.S. Sept. 29, 1998). The Eleventh Circuit had ruled that school districts could not be held liable for student-on-student sexual harassment under Title IX, in the absence of an express imposition of liability by Congress.

Different courts of appeals have sharply disagreed regarding school board liability for student peer harassment. *See, e.g., Oona R.S. v. McCaffrey*, 143 F.3d 473 (9th Cir.1998), *petition for cert. filed* (U.S. June 19, 1998) (Title VII principles apply to student peer harassment); *Morse v. University of Colorado*, 1998 U.S. App. LEXIS 20106 (10th Cir. Aug. 17, 1998) (Title IX principles enunciated in the *Lago Vista* case should apply to Title IX peer harassment cases); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.1996), *cert. denied* 117 S. Ct. 165 (1996) (Title IX does not impose liability on a school district for peer hostile environment sexual harassment unless the school district itself discriminates on the basis of sex, e.g., in turning a more tolerant eye toward sexual harassment of female students than of male students).

The forthcoming *Davis* decision during the 1998-99 term should provide much needed guidance regarding student peer harassment. If it is determined that students may assert Title IX claims based on harassment by other students, a school board should not be liable unless the *Lago Vista* standards are met. Recent lower court decisions agree. *Haines v. Metropolitan Government of Davidson County*, 1998 U.S. Dist. LEXIS 13125 (M.D. Tenn. July 17, 1998), and *Adusumilli v. Illinois Institute of Technology*, 1998 U.S. Dist. LEXIS 14413 (N.D. Ill. Sept. 8, 1998).

In the context of student peer harassment, it will be very important to determine which school employees are deemed "appropriate" officials for the purpose of the actual knowledge requirement. Under *Lago Vista*, an "appropriate" school official must be one "who at a minimum has authority to address the alleged discrimination and institute corrective measures." 118 S. Ct. at 1999. Plaintiffs can be expected to argue that all teachers (and perhaps teachers assistants and other classified school employees) have authority to take at least some meaningful steps to control student sexual harassment. The developing case law provides no clear guidance. In *Carroll K. v. Fayette County Bd. of Educ.*, 1998 U.S. Dist. LEXIS 13747 (S.D. W. Va. Aug. 25, 1998), a sixth grade student was attacked by a male classmate. A teacher who witnessed the attack allegedly exclaimed, "Oh God. Here we go again!" but made no attempt to intervene. The federal district court refused to dismiss the student's Title IX claim. The complaint described the teacher who witnessed the attack as "a teacher standing in loco parentis vested with supervisory authority over the school children." The allegations in the complaint permitted an ultimate finding that the teacher had authority to address the alleged discrimination and to institute corrective measures.

A different approach was taken in *Adusumilli v. Illinois Institute of Technology*, 1998 U.S. Dist. LEXIS 14413 (N.D. Ill. Sept. 8, 1998). A female college student alleged that she had been sexually harassed by four professors and six students on twelve occasions. She provided notice of only two incidents involving student harassment. On one occasion she notified the director of the college's Masters in Public Administration program. The court found "actual knowledge" on the college's part because the director was an "appropriate" official. The other report of student sexual harassment was made to a college professor. The court dismissed that portion of the plaintiff's claim, stating that the complaint offered no basis to infer that the professor was an official with authority to take corrective action to end the alleged discrimination. By analogy, a public school teacher might not be an "appropriate" official with authority to take corrective action.

PRACTICAL SUGGESTIONS

The *Faragher*, *Ellerth* and *Oncale* cases increase school boards' risk of legal liability for sexual harassment in the workplace. Sexual harassment policies and training procedures should be carefully reviewed and revised if necessary. The following suggestions are specifically designed to address issues raised in the recent Supreme Court cases:

- The school system should ensure that the sexual harassment policy is distributed to all employees. Ideally, all employees should confirm their receipt in writing.
- The policy should clearly designate the official(s) to whom complaints should be made.
- The policy should enable an employee to bypass the alleged harasser in filing a complaint.
- The policy should strongly prohibit retaliation against complainants.
- The policy should provide for confidentiality of complaints and investigations.
- The policy should include a reference to the possibility of same-sex harassment. All employees, and especially supervisors, should be made aware that allegations of same-sex harassment cannot be ignored or given substandard consideration.
- Since employers will be vicariously liable for sexual harassment perpetrated by supervisors, it is particularly important to fill supervisory positions with people who can be trusted not to commit sexual harassment. If any questions exist as to a supervisor's ability to adhere to the sexual harassment policy, the supervisor should be removed or, at a minimum, relieved of any unilateral authority to take tangible employment actions against subordinates.
- All employees, and especially supervisors, must be made to understand that sexual harassment will not be tolerated and will lead to severe employment consequences.

In the context of Title IX sexual harassment complaints by students, the *Lago Vista* case provides school boards substantial protection against liability. Some critics have said that *Lago Vista* provides a perverse incentive for school officials to close their eyes to sexual harassment of students in an attempt to avoid "actual notice." Such criticism misses the mark. School boards are never well advised to place legal liability considerations ahead of students' safety. Also, since liability under Title IX requires deliberate indifference, school districts who can show good faith efforts to protect students from sexual harassment are less likely to be found liable. The following suggestions are specifically designed to minimize school board liability under *Lago Vista*:

- Require sexual harassment complaints to be reduced to writing. A written complaint requirement should reduce the potential for disputes as to the date and/or content of purported "actual notice." However, in no circumstances should school districts ignore oral reports of sexual harassment.
- The policy should clearly designate the official(s) to whom complaints should be made. It also should state that the school district will not be considered to have notice of the complaint unless reported to those officials.
- All employees who become aware of potential sexual harassment of a student should be required to report the matter to the designated official(s). The school system could be at risk if the employee to whom the harassment is initially reported is ultimately deemed by a court to be a person with sufficient authority to take corrective action.
- Any report of alleged sexual harassment of a student should give rise to an immediate investigation. At the very least, there should be a conference with the alleged harasser about the ramifications of sexual harassment. Any such good faith effort should negate a finding of "deliberate indifference."

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